No. 89-333

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether hydropower facilities licensed by the Federal Energy Regulatory Commission pursuant to the Federal Power Act are exempt from state minimum instream flow requirements, notwithstanding Section 27 of that Act, which provides that nothing in the Act "shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein" (16 U.S.C. § 821).

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case is of interest to *amici* because it concerns the authority of a state regulatory agency to impose state law requirements on a private activity also regulated by a federal agency. The court of appeals in this case applied, in effect, a presumption in favor of preemption of any overlapping state authority, in ruling that where, as here, the Federal Energy Regulatory Commission has issued a license to a private entity to operate a hydro-

power facility, the state water regulatory agency cannot impose conditions on the facility's state water permit that are different in any way from those contained in the federal license. The court below reached this result notwithstanding the explicit savings language contained in Section 27 of the Federal Power Act, which preserves state laws "relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein" (16 U.S.C. § 821).

The court of appeals' ruling is significant to *amici* in two respects. First, it reflects an understanding of federal preemption that threatens to supersede countless important state regulatory programs. Overlapping state and federal regulatory requirements are the inevitable product of our federal system and not the presumptive trigger for federal preemption. Indeed, a contrary rule would be inconsistent with this Court's repeated admonition that preemption analysis "start[s] with the assumption that the historic police powers of the States were *not* to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). Nor is there any room for the court of appeals' view that the comprehensive nature of the federal regulatory scheme can support an inference of congressional intent to supersede overlapping state regulatory authority. Such inferences are permitted, if ever, only in the *absence* of express congressional guidance concerning the preemptive reach of a particular federal law.

Second, the court of appeals' ruling, if adopted by this Court, threatens immediate displacement of a critical area of traditional state concern: regulation of the use of water. Especially among the Western States, few matters are so central to the State's ability to safeguard the health and livelihood of its citizens as is the State's authority over water flowing within its borders. Hence, the court of appeals' view that Congress intended frag-

mentation of state authority by exempting federal hydropower licensees from any state oversight is extremely disturbing.

Amici submit that the decision of the court of appeals is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.*

STATEMENT

Amici adopt petitioner's statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federalism provides strength to our legal system, but is simultaneously the source of much friction and the impetus for much compromise. Our laws reflect "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). At times, of course, the tensions that inevitably result from the operation of federal and state sovereign authority in overlapping spheres can become intolerable. In those instances, it is for Congress to decide how the conflict should be resolved and, in particular, to ascertain whether federal preemption of state law is warranted under the Supremacy Clause.

Perhaps because "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress" (*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-51 (1985)), however, such congressional oversight typically results in a compromise of the federal and state interests.

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* The parties' letters of consent, pursuant to Rule 37 of the Rules of this Court, have been filed with the Clerk.

Congress rarely endorses sweeping preemption of overlapping state law. The same "national political process [that] systematically protects States from the risk of having their functions * * * handicapped by Commerce Clause regulation" curbs national efforts to supersede States' exercise of their historic police power authority to regulate in the public interest. *Id.* at 555; see, *e.g.*, *ETSI Pipeline Project v. Missouri*, 108 S.Ct. 805, 810 (1988) (discussing federalism concerns reflected in Flood Control Act, 33 U.S.C. § 701-1 (1952 ed.)).

The decision of the court of appeals, however, reflects an antagonism to state regulation of federally regulated activities that is antithetical to basic notions of federalism and inconsistent with this Court's established framework for ascertainment of congressional intent to preempt. The court improperly relied on inferential evidence of congressional intent to preempt state law in the face of explicit statutory language establishing that Congress struck a different compromise between federal and state interests.

Section 27 of the Federal Power Act directly refutes the court of appeals' ruling that hydropower projects licensed under that Act are exempt from minimum instream flow requirements imposed by state law. Section 27 commands that the Act shall not be "construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U.S.C. § 821. The state minimum instream flow requirement (imposed pursuant to Cal. Water Code § 1257 (West 1971)) that respondents here seek to evade is the very type of state law that Congress intended to preserve. It "relat[es] to the control, appropriation, use, or distribution of water used * * * for * * * other uses."

Contrary to the court of appeals' suggestion, there is no ambiguity in the literal terms of Section 27 that would support an alternative construction limiting its

scope either to the preservation of "state proprietary rights" or to state control of water for purposes "related" to irrigation or municipal uses. No such qualifiers appear in the language of Section 27. Nor is either suggested by any applicable canon of statutory construction.

Because, moreover, Congress expressly preserved state water law, it was improper for the court of appeals to infer congressional intent to preempt from the alleged "comprehensive" nature of the Federal Power Act's regulatory scheme. A court may rely on such evidence of *implicit* congressional intent to preempt only in the absence of *explicit* statutory language, such as that contained in Section 27, which defines the scope of federal preemption under the federal statute.

Nor may a court infer preemption based on an alleged "conflict" between federal and state law where, as in this case, toleration of such conflict was necessary to secure the federal statute's passage. The legislative history shows that many members of Congress were seriously concerned about the potential impact of federal water power legislation on state water law. The language contained in Section 27 was designed to address their concerns—even at the expense of the "comprehensive" federal regulatory scheme—and thus break the logjam that had long stalled congressional enactment of federal water power legislation prior to 1920. In such circumstances, a court may not substitute its vision of the best way to regulate hydropower for the political compromise actually struck by Congress.

Finally, this Court's decision in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), does not require a different result. The Court's discussion of Section 27 in *First Iowa* was technically dictum and should now be disavowed. Contrary to this Court's now settled precedent, the *First Iowa* Court's reading of Section 27 rested on a presumption *in favor of* federal preemption instead of the required presumption *against* federal preemption of traditional state police power au-

thority. *First Iowa* also relied heavily on an understanding of the meaning of Section 8 of the Reclamation Act —which served as the model for Section 27—that this Court has since disavowed in *California v. United States*, 438 U.S. 645 (1978).

ARGUMENT

PURSUANT TO SECTION 27 OF THE FEDERAL POWER ACT, HYDROPOWER PROJECTS LICENSED UNDER THAT ACT ARE NOT EXEMPT FROM STATE MINIMUM INSTREAM FLOW REQUIREMENTS.

The critical task "[i]n deciding whether a federal law preempts a state statute * * * is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983); see *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Preemption may be either express or implied. Congress may, by explicit statutory language, declare the extent to which it intends to preempt certain state laws. *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987). Alternatively, in the absence of explicit congressional guidance, this Court will

> infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Northwest Central Pipeline Corp. v. Kansas Corporation Comm'n, 109 S.Ct. 1262, 1273 (1989). In all events, where, as in this case, a party is claiming "preemption

of state law in areas traditionally regulated by the States," there is a "presumption against finding preemption." *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989). The Court in these cases "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 1665, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

In this case, that presumption cannot be overcome. There is no "clear and manifest purpose" evident in the Federal Power Act to preempt state authority to impose minimum instream flow requirements on those who possess a FERC license to operate a hydropower facility. Indeed, quite the opposite is true.

A. Section 27 Of The Federal Power Act Preserves State Authority To Impose Minimum Instream Flow Requirements On Federally Licensed Hydropower Facilities.

"The starting point for [the Court's] interpretation of a statute is always its language" (*Community for Creative Non-Violence v. Reid*, 109 S.Ct. 2166, 2172 (1989)). Section 27 of the Federal Power Act directly addresses the preemption issue raised by this case: whether Congress intended to preempt a State's authority relating to the control, appropriation, or use, of water used in hydropower facilities. Section 27 explicitly denies any congressional intent to prohibit such state laws. It declares that nothing in the Act "shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U.S.C. § 821.

The exercise of state authority challenged in this case falls squarely within the four corners of Section 27. It is a state law "relating to the control, appropriation, use, or distribution of water used in * * * other uses." Here,

respondent Rock Creek seeks to appropriate the use of water for hydropower, and the State of California seeks to control that use for the purpose of protecting the competing values achieved by maintaining a minimum instream flow.[1]

Nor should this result be surprising. Power to preserve and regulate the exploitation of water is a traditional state function. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 950-51 (1982); *California v. United States*, 438 U.S. 645, 653 (1978). Congress wrote Section 27 in expansive terms, consistently with its "purposeful and continued deference to state water law" "in the reclamation of the arid lands of the Western States" (*California v. United States*, 438 U.S. at 653); see 33 U.S.C. § 1251(g) ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Clean Water Act]."). [2] Congress has long understood the "highly interdependent" nature of water rights and the tremendous "legal

[1] The Solicitor General makes the curious suggestion that minimum instream flow may not amount to a "use" of water. See FERC Br. in Opp. 14 n.6. It is well settled, however, that "[w]ater use consists of (1) intake uses, (2) onsite uses, and (3) instream or flow uses" and that "[f]low uses include water for estuaries, navigation, waste dilution, hydroelectric power and also some fish and wildlife and recreational uses." National Water Commission, *Water Policies for the Future* 6 (1973). Most Western States, moreover, protect instream uses through instream flow laws. Johnson & DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 Nat. Res. J. 347, 361-67 (1989). Under California law, "recreation, fish and wildlife, and other uses are recognized as beneficial uses of water" and are protected "through water terms and conditions which require maintenance of bypass flows." *Id.* at 366, citing Cal. Water Code § 1243 (West 1971). But, in all events, it is enough that the State here is regulating respondent Rock Creek's "use" of water for hydropower purposes, which presumably all agree constitutes a "use" of water, within the meaning of Section 27.

[2] See Pet. Br. 18-22 (description of history of congressional deference to state water law).

confusion" that could result from the fragmentation of state authority. See *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976); *California v. United States*, 438 U.S. at 668-69. Because "water is a moveable, wandering thing," [3] a State cannot, as a practical matter, effectively regulate the use of water from a common source if certain users are exempt from state authority.[4]

It is, no doubt, for this reason that Congress included virtually no words of limitation in its express preservation of state authority to regulate the use of water. Section 27 denies any congressional intent to interfere with or affect such laws "in any way." And that provision deliberately extends its disclaimer of preemption beyond state regulation of water for irrigation or municipal uses to include regulation of water for "other uses."

In this case, therefore, Section 27 should be the end as well as the beginning of the Court's preemption inquiry. "[F]or where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026, 1030 (1989), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917).[5]

[3] 2 W. Blackstone, *Commentaries* *18.

[4] In its brief, the State provides concrete examples of the practical problems created by the court of appeals' exemption of FERC licensees from state water use regulation. See Pet. Br. 43-45.

[5] Because the statutory language is unambiguous, there is no occasion here to defer to FERC's construction, which contravenes Section 27's plain meaning. See *Public Employees Retirement System v. Betts*, 109 S.Ct. 2854, 2863 (1989); *ETSI Pipeline Project*, 108 S.Ct. at 817. But, in any event, FERC's current view does not appear to be the same as its predecessor's (Federal Power Commission's) initial contemporaneous reading of the Federal Power Act, which is the more weighty agency construction (*EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600, n.17 (1981)). FERC's predecessor appears to have read the Act, consistently with our view, as preserving state authority to apply its state water laws to federally licensed hydropower projects. See Pet. Br. 35

B. The Court Of Appeals' Failure To Honor The Plain Meaning Of Section 27 Is Not Justified By The Court's Assertion Of Ambiguity In Its Meaning, The Allegedly Comprehensive Nature Of The Federal Hydropower Licensing Scheme, Or Claimed Conflicts Between Federal And State Authority.

The court of appeals' finding of preemption in the face of Section 27 is flawed in three fundamental respects. First, the court invented ambiguity in the meaning of Section 27 where there is none. Second, the court improperly inferred congressional intent to preempt state water law based on the "comprehensive" nature of the federal licensing scheme for hydropower facilities under the Federal Power Act, notwithstanding Congress's explicit statement that no such inference should be drawn. Finally, the court inferred congressional intent to preempt based on a conflict analysis that wholly ignores that the Federal Power Act's passage was ensured only by the acceptance of such conflict within its statutory scheme.

1. The court of appeals' assertion that the meaning of Section 27 is ambiguous makes a mockery of this Court's repeated admonition that "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 471 U.S. 84, 95 (1985), quoting *Richards v. United States*, 369 U.S. 1, 9 (1962). There is simply no merit to the court of appeals' conclusion that the language of Section 27 "can support two conflicting readings" (Pet. App. A8): (1) "limit[ing] state authority to the area of property rights involving water for irrigation, municipal use, and related activities" (*ibid.*);

n.17. Indeed, because the federal agency seems to have shifted its view in response to litigation—in cases such as *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946)—its current construction, for that reason alone, may not be entitled to judicial deference. *Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468, 473 (1988).

or (2) "giv[ing] the states final authority over all issues connected to the control and use of water by a project licensed under the FPA" (*id.* at A9). Only the latter coincides with the ordinary meaning of the words of Section 27.

Section 27 preserves "the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, *or any vested right acquired therein*" (emphasis added). Hence, congressional intention to preserve "any vested right acquired" in water pursuant to state law is *in addition to* its intention to preserve state water regulatory authority generally and not to the exclusion of such continuing state authority.

Likewise lacking in merit is the court of appeals' conclusion that Section 27 can naturally be read as limiting state authority to "water for irrigation, municipal use, and related activities" (Pet. App. A8).[6] Section 27 preserves state authority relating to "water used in irrigation or for municipal *or other uses*" (emphasis added). The modifier "related" appears nowhere in the statute.[7]

FERC's contrary view (see FERC Br. in Opp. 14), must rest on the application of the principle of *ejusdem*

[6] This is the basis for the court of appeals' most narrow reading of Section 27, which is that even if the State possesses property rights in fish and fish uses, Section 27 is unavailing because it provides protection only to "municipal and irrigation proprietary rights" (Pet. App. A11 n.3).

[7] In *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954), this Court embraced the view that the language of Section 27 "is applicable to proprietary rights for power purposes," rejecting the contention that Section 27 is more narrowly confined. Because *Niagara Mohawk* concerned the propriety of the federal licensee's paying the expenses for the use of state water rights, the Court did not have to address the issue whether Section 27 protects *only* state proprietary rights. The Court's refusal, however, to limit Section 27 to "municipal" or "irrigation" uses is inconsistent with the court of appeals' narrow reading of "other uses" in this case.

generis, the canon of statutory construction expressing the notion that "where general words follow an enumeration of specific terms, the general words are read to apply only to other items like those specifically enumerated." *Garcia v. United States*, 469 U.S. 70, 74 (1984).[8] Reliance on this doctrine, however, is misplaced. "'[T]he rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.'" *Ibid.*, quoting *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980); *United States v. Turkette*, 452 U.S. 576, 581 (1981); see also *Cleveland v. United States*, 329 U.S. 14, 17-18 (1946). Here, as in *Garcia* ("other property of the United States"), *Harrison* ("any other final action"), and *Turkette* ("any union or group of individuals associated in fact"), there is no initial uncertainty requiring invocation of the principle. *Ejusdem generis* "cannot be employed to render general words meaningless, since that would be to disregard the primary rules, that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning." *Mason v. United States*, 260 U.S. 545, 554 (1923) ("other form of appropriation").[9]

Application of *ejusdem generis* is inappropriate also because the legislative history surrounding Section 27's

[8] See note 31, *infra*.

[9] In addition, application of the principle is not justified where, as in Section 27, the "terms in question are made separate and distinct from one another by Congress' use of the disjunctive" (*Garcia v. United States*, 469 U.S. at 75). Here, Congress has deliberately set "other uses" apart from "irrigation or municipal" in order to ensure the provision's expansive construction. Hence, application of *ejusdem generis* is not warranted because "it may not be used to defeat the obvious purpose of legislation." *United States v. Gooch*, 297 U.S. 124, 128 (1936); see *King v. United States*, 379 U.S. 329, 336-37 (1964) ("other person"); *United States v. Alpers*, 338 U.S. 680, 683-84 (1950) ("other matter of indecent character"); see also *Cutler v. Kouns*, 110 U.S. 720, 728 (1884) ("other crimes").

enactment (see pages 18-20, *infra*) establishes that Congress was aware of the potentially expansive meaning of adding "other uses" in the disjunctive. In particular, Section 27 was modelled after Section 8 of the Reclamation Act of 1902, which is virtually identical to Section 27, except that the Reclamation Act does not include the catch-all category "other uses" that the framers of Section 27 were careful to add.[10]

Finally, the court of appeals' narrow reading of Section 27 is precluded by this Court's decision in *California v. United States*, 438 U.S. 645 (1978). The Court in that case rejected a similarly narrow proposed construction of statutory language that is essentially identical to that contained in Section 27.

At issue in *California v. United States* was the meaning of Section 8 of the Reclamation Act of 1902, which provides that the Secretary of the Interior, in operating federal reclamation projects, must comply with state laws relating to the "control, appropriation, use, or distribution of water used in irrigation, or any vested right

[10] Nor did the addition of this phrase go unnoticed during the legislative process. Efforts were made to amend predecessor bills containing similar language in order to prevent a State from exercising the type of authority asserted by California here. See, *e.g.*, 51 Cong. Rec. 14066-67 (1914) (remarks of Rep. Mann) ("The provision says that any law that a State passes for any use of water shall prevail over this law."); *id.* at 14067 (remarks of Rep. Mann) ("Is the gentleman willing to accept an amendment to strike out the words 'and other,' in line 17"); *id.* at 14071 (remarks of Rep. Stevens) ("Not the same provision [as Section 8 of the Reclamation Act]. * * * It referred merely to irrigation. But you have got in here 'or other uses,' which covers the use of water for the development of power. It seems to give the State the authority to make laws governing the development of water power on these Government lands. The words 'or other uses' ought to be stricken from this section."). Because these efforts ultimately failed to prevent Congress from including the more expansive language, it would be especially improper now to use *ejusdem generis* to obtain the very result rejected by Congress in enacting the Federal Power Act. See *United States v. Mescall*, 215 U.S. 26, 32 (1909).

acquired thereunder" (43 U.S.C. § 383).[11] The Solicitor General, on behalf of the Secretary of the Interior in that case, like the Solicitor General on behalf of FERC in this case, resisted the plain meaning of the statutory language by positing that its sole legal effect was to require just compensation for any vested rights in water adversely affected by the federal activities. In a ruling directly applicable to the case at hand, the Court flatly rejected the Solicitor General's proffered construction. According to the Court, "Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.'" 438 U.S. at 674-75.

Respondents try to avoid the obvious force of *California v. United States* by claiming that Section 8 of the Reclamation Act is distinguishable from Section 27 of the Federal Power Act. See FERC Br. in Opp. 15-16; Pet. App. A12; Rock Creek Br. in Opp. 10-13. Comparison of the language of the two provisions and the legislative history of Section 27's adoption, however, show that the only difference was Congress's intent in Section 27 to provide even *broader* protection of state water laws than that provided for in Section 8.[12] Section 27 was modelled after Section 8 of the Reclamation Act, but explicitly extended beyond water used for irrigation to include water for "municipal and other uses" (see pages 12-13, *supra*). In all other relevant respects, the two provisions are, as the court of appeals itself acknowledged, "virtually identical" (Pet. App. A9).[13]

[11] Section 8, 43 U.S.C. § 383, provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *.

[12] U.S. Br. in *California v. United States*, at 52 ("Section 27 * * * is similar to Section 8 of the Reclamation Act, but broader.")

Indeed, in light of the Solicitor General's prior repeated acknowledgements of the close relationship between Sections 8 and 27, his current position that "Sections 8 and 27 would properly be interpreted as parts of two quite different statutory schemes" is surprising. See FERC Br. in Opp. 16 n.9. In his briefs before this Court in *California v. United States*, the Solicitor General repeatedly analogized Sections 8 and 27. In discussing Section 8, he argued that the "same analysis has governed this Court's interpretation of comparable statutory provisions such as Section 27 of the Federal Water Power Act." U.S. Br. in *California v. United States*, at 23. The Solicitor General also referred to a decision of this Court construing Section 27 as "[p]erhaps the closest analogous case" because the "Court there interpreted a provision similar to Section 8" (*id.* at 51). Indeed, the

[13] The Solicitor General alternatively posits (Br. in Opp. 15-16) that Section 8 is distinguishable because, unlike Section 27, Section 8 further provides that the "Secretary of the Interior, in carrying out the provisions of this Act, shall proceed 'in conformity with' such [state] laws" (43 U.S.C. § 383). That is a distinction that makes no difference to the outcome of this case. Section 27 does not include comparable language for the obvious reason that under the Federal Power Act, unlike the Reclamation Act, it is generally private parties (not a federal agency) that must comply with state water law. Hence, there was no need in the Federal Power Act to include a specific provision declaring that the federal agency must itself comply with state water law.

In any event, this case concerns the scope of state authority preserved by the savings portion of Section 27, and Sections 8 and 27 are "virtually identical" in that respect. The additional language in Section 8 upon which the Solicitor General relies does not purport to increase the scope of laws preserved. Rather it expressly confines the Secretary's compliance to "such" state laws as are preserved by the first clause of the provision.

Solicitor General argued that the Court's holding in that earlier case "applies *a fortiori* here" (*id.* at 129).

Nor is the Solicitor General's recognition of the close relationship between Sections 8 and 27 either of recent vintage or confined to his representation of the Secretary of the Interior. In arguing over 45 years ago in favor of the very same narrow reading of Section 27 that he currently propounds, the Solicitor General, on behalf of the FERC's predecessor, the FPC, happily embraced the analogy from which he now makes a hasty retreat. He argued that "[a] restricted construction of Section 27 is supported by the legislative history of that Section which shows that it was derived from Section 8 of the Reclamation Law of 1902." FPC Br. in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), at 39 n.23. Indeed, FERC's predecessor argued in that litigation that "[i]n the case of Section 27 the outstanding fact in its legislative history is its derivation through the public lands bills from Section 8 of the Reclamation Law of 1902." See *First Iowa* Pet. App. 58 (reproducing portion of the FPC brief filed in the court of appeals).

The Solicitor General cannot have it both ways. His loss in *California v. United States* may provide him with a strategic need to abandon his prior position concerning the close relationship of Section 8 to Section 27, but it in no sense deprives that position of its logical force. The relationship of Section 27 to Section 8 cannot be gainsaid.

2. Because, moreover, the meaning of Section 27 is unambiguous, the court of appeals' and FERC's reliance on the alleged "comprehensive" nature of federal regulation of hydropower facilities to support an inference of congressional intent to preempt is misguided. See Pet. App. A7-A9, A35; FERC Br. in Opp. 15-16. Simply put, any such inference is impermissible where, as in this case, Congress has expressly addressed the preemption issue. There is no room for a court to conclude that Congress impliedly preempted state law by enacting federal legislation that "occupied the field" when Congress has included in that legislation a provision such as Section 27 that expressly denies any such intention.

A savings provision such as Section 27, like a provision limiting agency jurisdiction, "provides its own rule of statutory construction." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. at 376-77 n.5. Thus, this Court has acknowledged that "Congress explicitly may define the extent to which its enactments pre-empt state law" and has indicated that it is only "[i]n the absence of explicit statutory language" that a court may conclude that Congress has "implicitly indicate[d] an intent to occupy a given field to the exclusion of state law." *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. 1145, 1150 (1988). See *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) ("Although Congress intended to dominate the field of pollution regulation, the savings clause negates the inference that Congress 'left no room' for state causes of action."); *California Federal Savings & Loan Ass'n*, 479 U.S. at 282 ("there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two [express] sections provide a 'reliable indicium of congressional intent with respect to state authority'"); *id.* at 295 (Scalia, J., concurring).[14] A finding of implied preemption therefore cannot validly be derived from the alleged "comprehensive" nature of FERC regulation of hydropower facilities pursuant to the Federal Power Act.[15]

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[14] Cf. *Northwest Central Pipeline*, 109 S.Ct. at 1276 ("To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of [Natural Gas Act] § 1(b) that leaves to the States control over production * * *."); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. at 370 ("We might be inclined to accept this broad reading of § 151 were it not for the express jurisdictional limitations on FCC power contained in § 152(b) [of the Federal Communications Act]."). See generally L. Tribe, *American Constitutional Law*, § 6-26, at 482 n.8 (2d ed. 1988).

[15] Nor, for this same reason, can FERC properly use the comprehensive nature of its regulatory authority under the Federal

3. The court of appeals' conflict analysis likewise fails to take adequate account of the significance of Section 27. The court of appeals embraced the sweeping notion that Congress intended to preempt any state law that "could" affect the economics of a project or that otherwise might "create a different type of hydropower project from the one described in the license." Pet. App. A12; see *id.* at A11-A13. What the court ignored, however, is that the language and legislative history of Section 27 evince congressional intent to tolerate state laws that seemingly conflict with federal policy.[16]

Section 27 reflects, at bottom, a compromise of competing interests. Prior to the enactment of the Federal Power Act in 1920, federal water power legislation had been stalled for years, largely because of the concerns expressed by representatives of Western States about the impact of such federal legislation on state authority over water. See generally J. Kerwin, *Federal Water-Power Legislation*, 105-263 (1926). Section 27's uneasy fit within a statutory scheme that seemed otherwise to purport to leave no room for continuing state authority did not go unnoticed either by those generally in favor of or opposed to the legislation. For the former, who tended to be less concerned about the impact on state law, the language ultimately included in Section 27 improperly allowed a State to exercise significant regulatory authority over a federally licensed hydropower facility and thus threatened to undo much of the purpose of federal leg-

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Power Act as an excuse for avoiding the plain meaning of Section 27 through the guise of "reconcil[ing] the provisions of Section 27 of the FPA with the comprehensive planning authority vested exclusively in [FERC] by Section 10(a)" (Pet. App. A30).

[16] While conflict analysis for preemption purposes may be warranted, notwithstanding an express nonpreemption provision, that analysis must still be tempered by it, lest that provision be rendered meaningless. See *Northwest Central Pipeline*, 109 S.Ct. at 1276-77 & n.12.

islation.[17] For those more sensitive to the potentially adverse effect of the legislation on state sovereignty, however, the inconsistency between the language ultimately included in Section 27 and the rest of the statute, which would otherwise leave the impression that a federal license trumped state water law, was the very feature of the language that they found the most inviting.[18] At the

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[17] See, *e.g.*, 51 Cong. Rec. 14066-67 (1914) (remarks of Rep. Mann (commenting on language identical to Section 27 contained in predecessor bill)); see note 10 *supra*.

[18] This is evident in several exchanges on the House floor. For instance, Representative Mondell, in commenting on identical language contained in a predecessor bill, remarked that "the amendment [to delete 'other uses'] ought not to be adopted, and yet it is a perfectly logical amendment from the standpoint of the other provisions of the bill * * *." 51 Cong. Rec. 14070 (1914). He further added that "[o]f course [the savings provision] ought to stay. It is one of the few provisions in the bill that ought to be enacted into law." *Ibid.*

Numerous other exchanges leave no doubt that those who favored the savings provision that ultimately became law in Section 27 viewed it as preserving state authority to require a federal licensee to comply with state water law requirements even where different from the conditions of the federal license. An exchange between Representatives Stevens and Raker is one of the more telling:

> Mr. Stevens: Suppose the State of Colorado has laws governing the use of water for the development of power, which laws vary materially from the rules and regulations set out in this act, which would govern, the State law or this law?
>
> Mr. Raker: In answer to the gentleman's question, as I view it, and as we are trying to arrange it, the State law in regard to water rights * * *.
>
> Mr. Stevens: Let me understand. You answer that question, then, by saying that the State law would control?
>
> Mr. Raker: Yes.

51 Cong. Rec. 14070-71 (1914). See 56 Cong. Rec. 9114-15 (1918) (remarks of Rep. Mondell); *id.* at 9810 (remarks of Rep. La Follette); *id.* at 10494, remarks of Sen. Myers); see also 59 Cong. Rec. 6537 (1920) (remarks of Rep. Sinnott).

end of the day it was those who sought the deliberate retention of that conflict within the statutory scheme that prevailed. The language of Section 27 was approved in congressional committee—"after strenuous efforts"—by a vote of 8 to 7 (see 56 Cong. Rec. 9115 (1918) (remarks of Rep. Taylor)), and the resulting compromise struck the balance that broke the legislative deadlock and ultimately secured approval of both chambers of Congress.[19]

For this very reason, FERC's invitation to ignore the plain meaning of Section 27 in order to embrace FERC's (or the court of appeals') vision of a more "workable" federal regulatory scheme must be declined. Congress struck a different compromise by including Section 27, and the courts must honor the legislative judgment. This Court's "task is to apply the text, not to improve upon it" (*Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S.Ct. 456, 460 (1989)).[20]

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[19] Representative Sinnott described well the nature of the compromise (56 Cong. Rec. 9290 (1918)):

> [O]n account of the sharply divergent views persisted in with great tenacity by the respective advocates of Federal and State ownership and control of our water-power resources Congress has no more perplexing legislation to vex it than that embodied in the bill now before the House.
>
> * * * * *
>
> [A]s most legislation is a compromise, this bill is as fair a compromise as can be expected to issue from ingenious and positive minds wedded to pet theories of government, unwilling to stultify long preconceived convictions, but regardful that the needs of the country demand that the deadlock which has for years tied up one of our most valuable resources should be broken.

Because the session ended before the Senate approved the compromise legislation, it was not passed until 1920 when both chambers approved an identical bill. See Pet. Br. 34.

[20] It is no matter that Congress apparently considered, and declined to enact, a proposal that would have required state consent to hydropower projects. See *First Iowa*, 328 U.S. at 179. The language not enacted was not confined, as is Section 27, to preservation of state water law. But, in any event, the central inquiry in statutory construction is the plain meaning of the language actually enacted, rather than speculation concerning the motives that might have prompted the failure of other versions of the bill to become law. Cf. *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. at 1153-54.

It is wholly beside the point whether the compromise embodied in Section 27 best serves the interests of federal hydropower development. Nor is it at all relevant whether that legislative result minimizes duplication of federal and state regulatory efforts. The sacrifice of some valuable interests is the essence of compromise.

Here, those favoring the maintenance of state control of the regulation of water prevailed at the expense of other potentially legitimate interests. The courts are not free in these circumstances, in the guise of statutory interpretation, to strike a different balance. Instead, "[s]trict adherence to the language and structure of the [federal statute] is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises." *Community for Creative Non-Violence v. Reid*, 109 S.Ct at 2177 n.14. For only "[g]iving full effect to the words of the statute preserves the compromise struck by Congress." *Hallstrom v. Tillamook County*, 110 S.Ct. 304, 310 (1989).[21]

Finally, there is no merit to the court of appeals' and respondents' implicit suggestion that the plain meaning of Section 27 should be avoided because toleration of a state "veto" of a federally licensed hydropower facility would produce "absurd or futile results." See *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940); *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). There is nothing inherently anomalous about a private entity having to comply with overlapping federal and state regulatory requirements.

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[21] See 53 Cong. Rec. 4204 (1916) (remarks of Sen. Myers) ("I do not care with whom I disagree. I agree with the bill, which says there is no intention to control or interfere with the waters of the States. I am satisfied to agree with the printed terms of the bill in its plain language.").

In this case, for instance, the State of California is not requiring respondent Rock Creek to violate any terms of its federal license. The State is not asserting any right to compel Rock Creek to violate the minimum instream flow requirements contained in its FERC license. To the contrary, the State is, consistently with the federal requirement that a specified "minimum" flow be allowed, requiring Rock Creek to allow a *greater* flow to be maintained. "Ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." *California v. ARC America Corp.*, 109 S.Ct. at 1667; see *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257-58 (1984).

State regulatory requirements that apply to a federally licensed hydropower project, moreover, do not necessarily preclude a private party from proposing to FERC a project that satisfies both state and federal concerns. As in *California Federal Savings & Loan Ass'n*, "[t]his is not a case where 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where there is an 'inevitable collision between the two schemes of regulation.' *Id.* at 143." 479 U.S. at 290-91. Indeed, there is not even a threshold showing here that compliance with the state standards would render respondent Rock Creek's project economically infeasible over the life of the project. To the contrary, based on a preliminary analysis, FERC found that the project "would be economically feasible over the 50-year term of the license with a levelized net annual benefit of approximately $26,000 if [the State's] recommended flows were adopted." Pet. App. A20.[22]

[22] Nor is the State in any way interfering with a federally required activity. The hydropower facility is not a federal project undertaken by the federal government itself. It is an entirely private endeavor that, based on its compliance with applicable federal requirements, has obtained a federal license from FERC. The legal significance of that federal license, however, is no more than that. It does not convert a private activity into the constitutional equivalent for Supremacy Clause purposes of a federal project. Cf. *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962) (federal license "simply acknowledgment that the activity does not violate federal law, and not an exemption from state licensing or police power requirements.").

In any event, the specter of a state law resulting in further regulation of some aspect of a private activity otherwise in compliance with a federal agency's requirements is anything but the anomaly suggested by the court of appeals and respondents. Such "veto" authority is the inevitable and healthy result in a wide range of contexts where federal and state regulatory authorities happily coexist.[23]

Nor is there any reason to suppose that hydropower projects require special treatment. Certainly, there is no general exemption from state law for hydropower projects. Federal reclamation projects frequently serve significant hydropower purposes and, following this Court's decision in *California v. United States*, such projects must comply with state water law unless inconsistent with clear congressional directives. See 438 U.S. at 672-79.

So, too, it is clear that a FERC licensee is not immune from another agency's regulation, even where the second agency is considering many of the same factors previously considered by FERC in deciding whether to issue

[23] See, *e.g.*, *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) (rejecting preemption challenge to state requirements applicable to federally licensed blood plasma vendors); *Rice v. Rehner*, 463 U.S. 713 (1983) (upholding state licensing requirements applicable to federally licensed Indian traders on Indian reservations); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) (upholding state economic regulation of federally licensed nuclear power facilities); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 337 (1973) (rejecting preemption challenge to state licensing requirements applicable to federally licensed marine terminal facilities); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (upholding state regulatory requirements applicable to federally approved agricultural commodities).

a license. For instance, under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, the Army Corps of Engineers may decide, based on its own weighing of many of the same environmental factors already considered by FERC pursuant to the Federal Power Act, that a FERC-approved hydropower project should be barred. See *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir.) (upholding, over FERC's objection, Corps authority to deny Section 404 permit to FERC licensee), cert. denied, 484 U.S. 816 (1987); see also *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (upholding, over FERC's objection, authority of the Secretary of the Interior to impose conditions on FERC licenses issued to projects located within a federal Indian reservation).[24]

Similarly, States already possess pursuant to the Clean Water Act the very type of overlapping regulatory authority with respect to water *quality* standards that FERC here claims Congress must be deemed to have preempted in the Federal Power Act with respect to water *quantity* standards. Not only do state water quality standards supplement federal water quality requirements

[24] Significantly, in a submission to this Court, the Solicitor General, on behalf of both FERC and the Army Corps of Engineers, recently maintained that the resulting overlapping regulatory scheme—which enables the Corps to "veto" FERC-approved projects—did not "present an important issue that warrants this Court's review." Fed. Resp. Br. in Opp. in *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C.), cert. denied, 484 U.S. 816 (1987), at 9. According to the Solicitor General, "[a]s a practical matter, agencies, such as [FERC] and the Corps of Engineers in this case, work out their overlapping programmatic interests through memoranda of understanding that allow each agency a substantial role in the decisionmaking process." *Ibid.* Notwithstanding the federal government's current protests that any overlap in federal and state authority is "unworkable," we believe that actual experience similarly suggests that "as a practical matter," the amount of serious conflict between sovereigns would be minimal. As the State points out, FERC licensees in California have historically sought state water permits and adhered to state regulatory requirements without incident. See Pet. 6-7 n.1.

under the Clean Water Act (see 33 U.S.C. §§ 1311(b)(1)(C), 1370), but Congress specifically required state certification of compliance with applicable requirements (see 33 U.S.C. § 1341) and also authorized the federal agencies responsible for implementation of the Act (EPA and Army Corps of Engineers) to allow administration of the permitting program by state agencies (see 33 U.S.C. §§ 1342(b), 1344(g)). Hence, the Solicitor General's assertion here that the purposes of the Federal Power Act will be hopelessly undermined absent preemption of state water law rings hollow. At the very least, it cannot be said that Congress shares the Solicitor General's apparent antipathy to overlapping state and federal regulatory authority.[25]

C. This Court's Discussion Of Section 27 In *First Iowa* Should Now Be Disavowed.

When all is said and done, respondents' principal support for their proffered construction of Section 27 is this Court's discussion of that provision 44 years ago in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946). For, apart from that decision, there is little in the language of Section 27 itself or the provision's

[25] The Solicitor General's reliance on the provisions of the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. 99-495, 100 Stat. 1243, is misdirected. See FERC Br. in Opp. 20-22. That statute was enacted after the issuance of the FERC license that is the subject of this litigation, but, in any event, the issue here is what Congress intended in enacting Section 27 of the Federal Power Act in 1920. That question does not turn on what a different Congress subsequently intended 66 years later when it amended and added other provisions to federal water power legislation. Moreover, as the State of California explains (Pet. Br. 15 n.8), there is no inconsistency between our view of Section 27 and the provisions of ECPA calling for heightened FERC consideration of the views of other federal and state agencies regarding the impact of a proposed project on instream values. A congressional effort to provide a procedural mechanism to minimize disagreements between federal and state agencies does not evince a "clear and manifest purpose of Congress" to supersede those other authorities when a disagreement persists. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

legislative history to buttress respondents' narrow reading of the Act's nonpreemptive purpose. Certainly the little evidence that might be garnered falls far short of the "clear and manifest purpose of Congress" that this Court has long made clear is required for preemption of a State's exercise of its traditional police power authority. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

We agree with petitioner that the Court's discussion of Section 27 in *First Iowa* was technically dictum.[26] We also agree with petitioner that that case is distinguishable because the state law challenged there, unlike the state law at issue here, sought to accomplish more than mere regulation of the use of water. But, like petitioner, we do not suggest that the significance of *First Iowa* can (or needs to) be discounted on either of those grounds alone. Although the Court's discussion of Section 27 in *First Iowa* was not, strictly speaking, necessary to the result, it was a substantial part of the Court's reasoning in determining the legal issue then before the Court: whether Section 9 of the Federal Power Act required an applicant for a FERC license to present satisfactory evidence of its compliance with state law as a prerequisite to its obtaining a federal license.[27] On re-

[26] The Court's discussion of Section 27 was dictum because it was not necessary to the Court's consideration of Section 9 of the Federal Power Act, the meaning of which was the sole issue squarely before the Court in *First Iowa*. Respondent Rock Creek's claim (Br. in Opp. 8-9) that the discussion must be considered the Court's holding because otherwise the case would be unimportant misapprehends the meaning of a judicial holding. There is no rule that a court's holding must be "important" and thus no corollary principle exists that anything important that a court says in its opinion must be considered part of its holding. Perhaps the most apt characterization of the *First Iowa* Court's discussion of Section 27 was its description by the court of appeals as "extensive commentary" (Pet. App. A10).

[27] See 328 U.S. at 163-64 ("The question at issue is the need, if any, for the presentation of satisfactory evidence of the petitioner's compliance with the terms of Chapter 363 of the Code of Iowa.").

examination, however, the *First Iowa* Court's reading of Section 27 is no longer tenable (if it ever was) and therefore should be disavowed.

The Court's description of Section 27 rested on three basic propositions: (1) the comprehensive nature of the federal licensing scheme (328 U.S. at 164-74); (2) the conflicts between state and federal policy that might result from allowing the application of state water law (*id.* at 167-74); and (3) the Court's understanding of the meaning of Section 8 of the Reclamation Act, which served as the model for Section 27 (328 U.S. at 176-77 & n.20). None withstands scrutiny.

1. The first—the allegedly "comprehensive" nature of the federal permitting scheme—is simply not a legitimate basis for inferring congressional intent to preempt in the face of Section 27's plain terms. As described above (see pages 16-17, *supra*), this Court's decisions have since made clear that reliance on such inferential evidence of intent to preempt is improper where, as in the case of the Federal Power Act, Congress has included a statutory provision (Section 27) that explicitly limits the preemptive scope of the federal Act.

In addition, the Court in *First Iowa* did not have the benefit of full briefing concerning the legislative history of Section 27's enactment and, as a result, misapprehended the congressional purpose in enacting "comprehensive" legislation.[28] As the State shows in this case (see Pet. Br. 31-32), careful examination of the relevant legislative history indicates that Congress sought, at most, to achieve "comprehensive" legislation in the sense of avoiding the fragmented authority at the *federal* level

[28] Contrary to the court of appeals' and FERC's assertion (Pet. App. A12-A13; FERC Br. in Opp. 14-15 n.7), the parties in *First Iowa* did not fully brief the Court concerning the legislative history of Section 27's adoption. In particular, the State of Iowa's submissions in that case contain virtually no references to any of the relevant legislative history, which is ably presented in the State of California's brief in this case.

that had previously hampered hydropower development.[29] The legislative history contradicts the then far more controversial proposition that overlapping state water law authority should also be superseded to promote further hydropower development.

2. The *First Iowa* Court's conflict analysis is similarly deficient. The Court started from the premise that Congress must be presumed to have intended to preempt an overlapping state permit requirement "in the absence of an express provision for it."[30] The Court thus reversed the now-settled presumption against preemption of state law. Indeed, notably absent from the Court's opinion in *First Iowa* is any reference to the need for a "clear and manifest purpose of Congress" to overcome that presumption and thus to preempt state police power authority.

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[29] It is far from clear, however, that the Federal Power Act provides FERC with "comprehensive" authority among federal agencies. See, *e.g.*, *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (Secretary of the Interior may impose conditions on licenses issued to projects located within federal Indian reservation); *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir.) (Army Corps of Engineers may deny Clean Water Act Section 404 permit to FERC licensee), cert. denied, 484 U.S. 816 (1987); *Uncompahgre Valley Water Users Ass'n v. FERC*, 785 F.2d 269 (10th Cir.) (Secretary of the Interior (not FERC) possesses exclusive authority to regulate hydropower facilities at a reclamation project), cert. denied, 479 U.S. 829 (1986); see also C. Meyers & A. Dan Tarlock, *Water Resource Management* 489-91 (1971) ("Historian Samuel Hays argues that in fact the 1920 Act was a rejection of comprehensive development."), citing S. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement 1890-1920*, 208-09, 239-40 (1959).

[30] See 328 U.S. at 167 (emphasis added) ("Similarly, compliance with the engineering requirements of the State Executive Council, if additional to or different from the federal requirements, may well result in duplications of expenditures that would handicap the financial success of the project. Compliance with requirements for a permit that is not to be issued is a procedure so futile that it cannot be imputed to Congress *in the absence of an express provision for it.*").

The *First Iowa* Court also never took into account the significance of Section 27 in its conflict analysis. As a result, the Court improperly substituted its vision of sensible policy—the absence of overlapping federal and state permitting authority—for the quite different compromise struck by Congress in including Section 27 in the Federal Power Act. See pages 18-20, *supra*.

3. Finally, the Court's description of Section 27 in *First Iowa* was based on an understanding of the meaning of Section 8 of the Reclamation Act—which all agree served as the model for Section 27—that this Court has since disavowed. The Court reasoned (and the Solicitor General argued) in *First Iowa* that "[t]he use, in § 27 of the Federal Power Act, of language having a limited meaning in relation to proprietary rights under [Section 8 of the] reclamation law and in public land bills, carries that established meaning of the language into the Federal Power Act in the absence of anything in the Act calling for a different interpretation of the language." 328 U.S. at 177 n.20.[31]

As discussed above (see pages 13-15, *supra*), however, this Court in *California v. United States*, has since squarely addresed the meaning of Section 8 and concluded —contrary to its assumption in *First Iowa*—that its meaning is not limited "to proprietary rights," but instead broadly extends to the preservation of state regulatory authority over water rights. See 438 U.S. at 674-75.[32] This Court should now revisit the meaning of Sec-

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[31] The *First Iowa* Court also cited to a lower court decision that had in turn relied on the application of the principle *ejusdem generis* in support of a limited construction of Section 27. See 328 U.S. at 176, citing *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 619 (1922). As discussed above, however, that principle of statutory construction does not apply to the language of Section 27 and, in any event, this Court in *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. at 256, has since rejected that aspect of its narrow reading of Section 27 in *First Iowa*. See pages 11-13 & note 7, *supra*.

[32] The Court in *California v. United States* agreed with the State that state water regulations that were inconsistent with clear con-

tion 27 in light of *California v. United States* and, based on its reasoning, formally acknowledge that Congress likewise intended just what it said in the Federal Power Act: to preserve state regulatory authority "relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses * * *."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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gressional directives would, of course, be preempted. See 438 U.S. at 672-79. Respondents' preemption challenge here, however, is based on the allegedly "comprehensive" nature of FERC's licensing authority and not on the equivalent of "specific congressional directives." Notably, in *California v. United States*, the Court rejected a preemption claim that was similarly based on the "comprehensive" nature of the Secretary of the Interior's authority under the Reclamation Act. See 438 U.S. at 677-78.